United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1711

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

P/S

REX-NORECO, INC.,

Plaintiff-Appellee,

-vs.-

ISIDORE GOODSTEIN and PARKSVILLE MOBILE MODULAR, INC.,

Defendants-Appellants.

BRIEF OF PLAINTIFF-APPELLEE

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2

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

BRIEF OF PLAINTIFF-APPELLEE

The Issue Presented for Review

The sole issue presented by this appeal is whether on the record before it, the District Court's determination that plaintiff-appellee is entitled to a preliminary injunction pending ultimate disposition of this action was an abuse of discretion.

Statement of the Case

The Proceedings Below

This is an interlocutory appeal from an Order of District Judge Lasker granting plaintiff-appellee (herein sometimes referred to as "Rex") a preliminary injunction restraining the defendants-appellants (herein sometimes referred to as the "Appellants"), individually and collectively, during the pendency of this action from (i) engaging directly or indirectly in the sale of mobile homes from a specific location in Parksville, New York, or from any other location within a 200 mile radius of Loch Sheldrake, New York, and (ii) from performing various activities and services from such a location relating to the sale or financing of mobile homes. The Court below expressly based that Order on an evidentiary hearing which had been held on May 6, 1974, at which the individual defendant (Goodstein), counsel for the defendants-appellants, a representative of plaintiff and plaintiff's counsel were present, as well as upon the substantial

affidavits and exhibits that had been submitted by the parties.

In their Opposing Affidavits in the Court below the Appellants did not challenge the existence or validity of Goodstein's 1970 covenant not to sell mobile homes within 200 miles of a Rex sales location for two years following Goodstein's termination of employment. Moreover, at the Hearing in the Court below the Appellants conceded that their Parksville, New York location is within "seven miles or thereabouts" of Rex's Loch Sheldrake location (Tr. 6)*. The only issue raised by the Appellants in opposition to the grant of a preliminary injunction was whether Rex, directly or through its Loch Sheldrake Mobile Home Sales, Inc. ("LSMH") subsidiary, is in fact engaged in the retail sales of mobile homes at the Loch Sheldrake, New York location. (See Goodstein Opposing Affidavit, sworn to April 24, 1974, ¶¶ 12, 14, 15; Fabricant Opposing Affidavit, sworn to April 24, 1974, passim; Goodstein Counter Reply Affidavit, sworn to April 30, 1974, passim). At no time in the Court below did the Appellants challenge the existence or validity of the non-competition covenant on which Rex relies. The papers submitted by Rex to the Court below, particularly the Reply Affidavits of Mark A. Salitan, sworn to April 25, 1974, of Rubin Schertz, sworn to April 25, 1974, and of Jeffrey A. Fillman, sworn to April 25, 1974, show that at all times relevant to the allegations

*"(Tr.-)" is used herein to refer to the Transcript of the May 6, 1974 evidentiary hearing held before Hon. Morris E. Lasker, District Judge, in the Court below.

in the Complaint, and to this very date, Rex has been engaged in the retail sale of mobile homes in the Loch Sheldrake, New York area, within 200 miles of the sales location the Appellants have opened in Parksville, New York. Accordingly, the contentions made by Appellants in the Court below to ward off the grant of injunctive relief were without foundation in fact.

However, given a seeming factual dispute, and mindful of the factual and legal foundation upon which a preliminary injunction must be predicated, the Court below held an evidentiary hearing for the express purpose of hearing all relevant evidence the parties might wish to adduce on "The factual issue...raised by the defendant as to whether or not the operation being conducted at the location which, for the purpose of this hearing and motion we will call the Loch Sheldrake location, is of such a nature as to qualify as a location referred to in the letter covenant not to compete..."(Tr.2).

At that Hearing, Rex introduced testimony of its President concerning the nature and extent of mobile home retail sales operations carried on by LSMH at the Loch Sheldrake, New York, location, and the Appellants' counsel took advantage of the opportunity there afforded to cross-examine on that issue. Rex also sought to call the individual defendant (Goodstein) as a hostile witness and made an offer of proof to the effect that

Goodstein would be required to testify that he had surreptitiously begun making arrangements to enter into competition with Rex's Loch Sheldrake operation while still employed by Rex (Tr. 19), but that the offer of proof that was rejected by the Court as irrelevant to the sole issue raised by the Appellants' in the Court below. In contrast, the Appellants made no effort to call any witnesses or make any offer of proof at the Hearing to contradict the unimpeached testimony there adduced on the one issue that was before the Court.

Undisputed Facts

All but one of the facts relevant to Rex's motion for a preliminary injunction were undisputed. These included:

1. Appellant Goodstein was first employed by Rex in 1965 as a mobile home sales lot manager, (Salitan April 18 Affidavit, ¶4*). By the time Goodstein terminated his employment with Rex, he was a Vice President earning $30,000 per annum plus certain fringe benefits. (Salitan April 18 Affidavit ¶4). During the course of his employment by Rex, Goodstein was substantially involved with and responsible for mobile home retail sales activities engaged in by Rex. (Goodstein Affidavit ¶18; Salitan Affidavit ¶5-6).

*The affidavit of Mark A. Salitan sworn to April 18, 1974, and attached to the Order to Show Cause dated April 19, 1974, is herein referred to as the "Salitan April 18 Affidavit." The Salitan Affidavit sworn to April 25, 1974 is herein referred to as the "Salitan April 25 Affidavit" and the Affidavit of Isidore Goodstein in Opposition to Plaintiff's Motion is referred to as the "Goodstein Affidavit."

2. On or about August 14, 1970 Goodstein entered into a written employment contract with Rex which, taken together with an interpretative letter also dated August 14, 1970, contains an express covenant on Goodstein's part not to engage directly or indirectly in the retail sales of mobile homes within a 200-mile radius of a sales location maintained by Rex at the time Goodstein's employment by Rex might terminate for a period of two (2) years following such termination of employment. (Goodstein Affidavit ¶5 and 11; Salitan April 18 Affidavit ¶7-8 and Exhibits "A" and "B" thereto).

3. During the course of his employment by Rex, Appellant Goodstein was well aware of the fact that, through its Loch Sheldrake subsidiary, Rex was maintaining a mobile home retail sales location in the Loch Sheldrake, New York area, (Goodstein Affidavit ¶14 and 18; Salitan April 25 Affidavit ¶3). Indeed, there was a time during the course of employment by Rex when the supervision and management of that sales location was among Goodstein's responsibilities. (Goodstein Affidavit ¶14).

4. Although there appeared to be some ill-defined dispute over the date upon which Goodstein's employment by Rex actually terminated, it was undisputed that no earlier than late 1973 (Rex placed the date at February 5, 1974) Goodstein's employment by Rex terminated. (Goodstein Affidavit ¶20; Salitan April 25 Affidavit)*.

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*On page 9 of their Brief in this Court the Appellants seem now to have conceded that Goodstein left Rex's employ "In February 1974", not in August 1973 as Appellants had unsuccessfully contended in the Court below.

5. On November 16, 1973 Goodstein signed the Certificate of Incorporation of defendant Parksville. That Certificate of Incorporation was filed with the Secretary of State of New York on November 26, 1973. (Salitan April 18 Affidavit ¶9). There was no dispute that Parksville is Goodstein's corporate vehicle for the conduct of a mobile home retail sales operation in the Parksville, New York area, within 200 miles of the Loch Sheldrake location which Goodstein concedes was maintained by Rex through LSMH during the course of his employment by Rex.

6. His employment by Rex having been terminated, through defendant Parksville Goodstein now proposes to engage in the business of selling new and used mobile homes at retail from the Parksville location.

Appellants' attempt in the Court below to dispute the fact that through LSMH Rex is still engaged in the sale of mobile homes at the Loch Sheldrake location resulted from demonstrably incorrect inferences drawn by Appellants from undisputed facts.

It was undisputed that, on or about March 30, 1973, Rex's LSMH subsidiary sold the land underlying its Loch Sheldrake sales lot, together with certain incidental personalty and fourteen new mobile homes, to an unaffiliated third party. However, under the agreement of sale, LSMH expressly retained fifty-four used mobile homes then located on the Loch Sheldrake lot and retained the right to sell those mobile homes, and mobile homes subsequently acquired LSMH, from that lot for its own account,

(or for the account of others for whom Rex and LSMH may have been acting as agent). (Fillman Affidavit, passim).

Thus, the inference that Appellants sought to have the Court below draw from the March 1973 land sale by LSMH -- that LSMH had terminated its retail sales operations in March 1973 -- is erroneous. Rex submitted both documentary and testimonial evidence -- which was not contradicted or impeached -- showing that LSMH's retail sales operations continued in a substantial manner after the land sale up to and including the commencement of this action.

LSMH's corporate existence has continued to date. Furthermore, the Salitan, Schertz and Oelbaum Affidavits sworn to April 25, 1974, and the entire testimony of Salitan at the May 6 Hearing (Tr. 3-18), establish that LSMH has continued to engage actively in the retail sale of mobile homes from the Loch Sheldrake location throughout the period from March 1973 to date. That this active engagement in mobile retail sales has been open and notorious (not hidden or secretive) was demonstrated by the continuous substantial advertising by LSMH during the post-March 1973 period annexed to the Salitan Affidavit. That this active engagement in mobile home retail sales has been substantial in dollar terms was demonstrated by the gross sales and taxes resulting therefrom shown on LSMH's State and Local and Use Tax Returns for relevant

fiscal quarters annexed to the Schertz Affidavit. That this active engagement in mobile home retail sales has been in a manner substantially consistent with LSMH's prior operations and with Rex's over-all operations (as well as being substantial) was demonstrated by the Oelbaum Affidavit, the exhibits attached thereto and the testimony at the Hearing.

Moreover, the evidence in the Court below established that this active engagement in mobile home retail sales by LSMH is important to Rex beyond the profits that might be derived directly by LSMH upon each mobile home sale: Not only does Rex obtain revenue from banks to whom retail contracts arising from such sales might in turn be sold by LSMH, but it may also derive insurance commissions or premiums from various types of insurance purchased by LSMH's vendees. In addition, it was shown that the very existence of the LSMH sales outlet supports Rex's other activities insofar as it gives Rex an outlet through which homes repossessed for customer banks may be resold for such banks on a favorable basis. (Salitan Affidavit April 18, ¶2; Tr. 12)

Insofar as the undisputed and indisputable facts thus refuted the factual premise of Appellants' sole contention in the Court below, Rex was prima facie entitled to the relief it sought.

Facts Relied on By Appellants Which Were Not Before the Court Below

Confronted as they are by well-founded findings of fact to the effect Rex will ultimately prevail on the merits of its

claims for breach of contract, the Appellants would now attack the Order of the Court below on grounds not raised below -- grounds which are not well-founded in any event.

Appellants now contend that Rex was not enetitled to a preliminary injunction because no express finding was made by the Court below as to the comparative impact on the parties of a grant or denial of such relief (Appellants' Br. Point III). However, the Appellants' never made that argument to the District Court. Indeed, there is no evidence to support the factual assertion made in Appellants' Brief that the Order appealed from permanently bars Appellants from the mobile home retail business. The terms of the Order only prohibit Appellants from engaging in certain activities within a 200-mile radius of Loch Sheldrake, New York, and then only until final disposition of the action. Moreover, the evidence in the record, coupled with Rex's Offer of Proof as to Appellants' "unclean hands" (Tr. 19) show that any hardship that might befall Appellants as a result of the preliminary injunction is Goodstein's own doing. With the entire United States available except for the 200 miles surrounding Wilson, North Carolina and Loch Sheldrake, New York, and with full knowledge of the covenant he had signed, Goodstein, surreptitiously and while still in the employ of Rex, organized a competing business and arranged to move himself and his family from North Carolina to the Loch Sheldrake area.

It is also significant that Appellants have never argued that Rex delayed in any way in seeking to enforce its rights once Goodstein's unconscionable conduct came to its attention in April 1974.

The so-called "facts" now relied on by Appellants' in urging that the comparative impact of the preliminary injunction require that it be vacated are not only unsupported by evidence in the record, but they are grossly inaccurate and contradict Appellants' position. For example, at page 16 of their Brief, Appellants' claim that Rex's results of operations in fiscal 1973 included $53 million of losses from mobile home sale operations. That statement is irresponsible not only because it is unsupported by any evidence, but also because it is completely incorrect. In any event, the enormous losses Appellants' would thus attribute to Rex's mobile home sales operations contradict the last sentence on page 16 of their Brief that Rex's "role as a retail sales operator is miniscule compared to its other areas of endeavor."

Appellants' attempt to avoid the fact that the arguments they now advance were not made to the Court below by attacking the fairness of the Hearing that was held. However, their assertion that Appellant Goodstein was not allowed to present testimonial evidence at the Hearing will not stand scrutiny. A review of the Transcript of the Hearing establishes that the only party who sought to adduce testimony from Goodstein was Rex. At page 19 of

the Transcript, Rex's counsel made a clear offer of proof that Goodstein had initiated his efforts and activities in organizing the corporate defendant to compete with Rex upon Goodstein's termination of employment by Rex while still employed by Rex, and that Goodstein had kept those activities concealed from Rex until after his employment had been terminated. The Transcript is equally clear that Judge Lasker dispensed with such a line of proof because he did not consider that the issue before him required further examination of the comparative "equities" in this matter. The issues having been presented as turning on the single fact of whether plaintiff was still engaged in the retail sale of mobile homes from the Loch Sheldrake location, the District Court did not consider it relevant to review evidence of the defendants' lack of good faith.

The Transcript of Hearing shows that Appellants' never made any offer of proof or otherwise indicate any desire to introduce testimony of Appellant Goodstein or anyone else. Thus, the Transcript belies Appellants' assertion at pages 11 and 20 of their Brief that the Court below erred and abused its discretion by refusing to allow Appellants to introduce evidence in opposition to Rex's motion for preliminary injunctive relief.

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In short, in the District Court the Appellants made but one argument in opposition to Rex's motion. That argument was that Rex is not engaged in the retail sale of mobile homes from

its Loch Sheldrake, New York location. A review of the entire record before the District Court, as well as the Transcript of the May 6 Hearing, demonstrates that the Appellants implicitly conceded that a preliminary injunction might issue if the Court below were to find that Rex would probably prevail with respect to the single fact which Appellants had placed in issue.

Argument

The preliminary injunction issued by the Court below was fully supported by Findings of Fact based on the record before the Court and did not constitute an abuse of discretion.

The entire thrust of Appellants' Brief shows recognition of the well-established principle that in order to reverse a trial judge's decision on a motion for preliminary injunctive relief, a clear abuse of discretion must be shown. See, e.g., Dekar Industries, Inc. v. Bissett-Berman Corp., 434 F. 2d 1304 (9th Cir. 1970); Delmo Sales Co. v. Tysons Corner Reg. Shopping Center, 429 F. 2d 206, 209, (D.C. Cir. 1970); A Quaker Action Group v. Hickel, 421 F. 2d 1111 (D.C. Cir. 1969); Packard Instrument Co. v. ANS, Inc., 416 F. 2d 943 (2d Cir. 1969).

The Appellants first argument - that Rex is not entitled to a preliminary injunction as of right - is irrelevant both because it ignores the principle governing the scope of appellate review of the Order appealed from and because Rex has never contended that it was entitled to such relief without regard to the record before the Court below. Indeed, the substantial evidentiary showing made

by Rex in the District Court was made in recognition of the principle that a preliminary injunction will only issue of (i) the applicant for such relief has established a prima facie case with respect to the facts relevant to the grant of such relief and (ii) there exists a reasonable probability that such applicant will ultimately prevail upon a plenary trial of the issues raised in the action.

Appellants contend that Rex also had the burden of establishing that its total business would be irreparably injured, and that Appellants would not be injured, by the issuance of the preliminary injunction. That contention misconceives the standards governing exercise by a District Court of its discretionary power to issue a preliminary injunction for the purpose of preserving the status quo pendente lite. The authorities, particularly in this Circuit, establish that a preliminary injunction will be granted where the applicant for such relief has made a "clear showing" (i) of probable ultimate success in the action, and (ii) of possible irreparable injury. See, e.g., Sonesta v. Wellington Associates, 483 F. 2d 247 (2nd Cir. 1973); Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co., 476 F. 2d 687 (2nd Cir. 1973); Engine Specialties, Inc. v. Bombardier Limited, 330 F. Supp. 762 (D. Mass. 1971). As this Court said in Packard Instrument Co. v. ANS, Inc., 416 F. 2d 943, 945 (2nd. Cir. 1969):

> "The decision to grant or to deny a preliminary injunction depends in part on a flexible interplay between the likelihood of irreparable harm to the movant and the court's belief that there is a 'reasonable certainty' that the movant will

> succeed on the merits at a final hearing. Unicorn Management Corp. v. Koppers Management Corp., 366 F. 2d 199 (2d Cir. 1966)."

In the present case, as in Packard Instrument, a 'reasonable certainty' that the movant may succeed on the merits at a final hearing and a "danger of suffering irreparable harm" have been shown.

In the present case, given the one issue tendered to the District Court by Appellants, Conclusion of Law Number II, which is virtually to the effect that Rex will prevail in this action after a plenary trial, is amply supported by the weight of evidence.

Moreover, Appellants' contention that the Order appealed from was not supported by any findings to the effect that Rex would sustain irreparable injury if preliminary injunctive relief denied ignores Finding of Fact Number 12 upon which that Order was based. In that Finding, Court below expressly stated:

> "If defendants' conduct is permitted to continue Rex will suffer irreparable injury in terms of loss of retail business, interference of proper performance of service obligations to lending institution clients, and harm to good will developed over the years. Rex does not have an adequate remedy at law to compensate it as to such injury."

That Finding represented an elaboration of the Finding articulated by the District Judge at the end of the May 6 Hearing to the effect that:

> "...The plaintiffs have demonstrated the probability of success on this Motion for a preliminary injunction and that they would suffer irreparable harm if Mr. Goodstein's operation were launched as it is planned." (Tr. 21)

The fact that the Findings of Fact contained in the Order appealed from do not include an express negation that the preliminary injunction may adversely affect the Appellants, does not constitute an abuse of discretion by the Court below. See, Schilling v. Schwitzer-Cummins Co. 142 F. 2d 82 (D.C. Cir. 1944); 5A Moore's Federal Practice, ¶52.06[1], p. 2710. In any event, the transcript of the May 6 Hearing clearly reflects that the Court below considered the impact of preliminary injunctive relief on the Appellants (particularly on Appellant Goodstein), but did not believe that such impact justified more than a one-week stay (later extended to ten days) within which Appellants might seek a further stay from this Court. (Tr. 21-22)*

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*The Appellants ultimately sought a further stay of the preliminary injunction from this Court; on May 28, 1974, not having even ordered a copy of the Transcript of the May 6 Hearing, Appellants application for a stay (which was based on arguments substantially the same as those raised on this Appeal) was denied by a panel of this Court consisting of Judges Moore, Weinfeld and Feinberg.

The express Findings of Fact and Conclusions of Law contained in the Order appealed from, taken together with the Transcript of the Hearing in the Court below, belie Appellants contention that the Court below did not give any consideration to the relative impact of a grant or denial of a preliminary injunctive relief on the parties. In any event, as the Sonesta and Gulf & Western Industries cases, supra, establish, an applicant for preliminary injunctive relief who demonstrates a clear probability of ultimate victory need not establish that the balance of equities tips as heavily in his favor as may be required where only a substantial question on the merits and not a probability of success is shown.

As this Court said in Saxe v. United States, 471 F. 2d 1293, 1296 (2nd Cir. 1972), "...The likelihood of ultimate success is a prime factor" in considering whether a District Judge has abused his discretion in granting or denying a preliminary injunction. In the present case, given the fact that Rex has convincingly established a likelihood of ultimate success, the Court below did not abuse its discretion in granting the relief sought.

Recent cases which closely resemble the present case, in that they involved preliminary injunctions to restrain competitive conduct by former employees, have established that a former employee (such as Appellant Goodstein) cannot evade obligations against

him imposed by contract or by law barring competition with a Former employer merely because the former employee may be a relatively "poor" individual and the former employer is a substantial business entity. In Arnold's Ice Cream Co. v. Carlson, 330 F. Supp. 1185 (E.D.N.Y. 1971), the District Court granted a preliminary injunction to restrain former employees of the plaintiff from selling to the plaintiff's former customers although it was apparent that the plaintiff was a substantial corporation (having a yearly sales volume of approximately $2.5 million), whereas the defendants were individual ice cream truck drivers whose economic resources were obviously insignificant in comparison with those of the plaintiff. The disparity between the economic conditions of the plaintiff and the defendants in the Arnold Ice Cream case did not deter the District Court from concluding that:

> "Plaintiff has shown a reasonable probability of ultimate success on the merits, and of injury that would be irreparable." (330 F. Supp. at 1188)

The similarity between the Arnolds's Ice Cream Co. case and the present case is clear. Furthermore, in the present case as in that case, "the defendants stepped so far over the line of loyalty owed by an employee to the firm which pays their salaries that monetary damages cannot repair the harm they have done." (Ibid)

In Mixing Equipment Co. v. Philadelphia Gear Co., 436 F. 2d 1308 (3rd Cir. 1971), the issuance of a preliminary injunc-

tion restraining a former employee from serving a new employer in violation of his agreement with a former employer was found not to be an abuse of discretion. In that case, as in the present case,

> "...a full hearing has been held and all factual and legal issues relating to liability have been determined in favor of the party seeking injunctive relief, and where the trial court has found a likelihood of irreparable injury pendente lite, a preliminary injunction is an appropriate remedy." (436 F. 2d at 1315)

Nor was the majority of the Third Circuit deterred from affirming the District Court's issuance of injunctive relief by the fact that the plaintiff was a substantial corporate entity, whereas the defendant was an "inconspicuous" employee. In any event, the record in the present case establishes that Appellant Goodstein was not an "inconspicuous" employee of Rex but was substantially involved in the establishment and conduct of Rex's LSMH mobile home retail sales activities at Loch Sheldrake, New York as well as at other locations.

Appellants reliance on R.F.D. Group Limited v. Rubber Fabricators, Inc., 323 F. Supp. 517 (S.D.N.Y. 1971) is misplaced. In that case, unlike the present case, the preliminary injunction sought by plaintiffs (323 F. Supp. at 527) exceeded the scope of the court's jurisdiction over the subject matter of plaintiffs' claims. Moreover, the District Court in R.F.D. Group Limited issued a peliminary injunction restraining defendants to the